THE

ARGUMENT LIST

OF

THE LAW ACADEMY

OF PHILADELPHIA.

SESSION OF 1869—1870.

PHILADELPHIA:

PRINTED FOR THE LAW ACADEMY ONLY, BY E. C. MARKLEY & SON.

1869.

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Whitehead, G.,
Whitehead, W.,
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Willson, Robert N.,
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Wireman, Henry D.,
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	1869.				1870.				
	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
Sharswood.....	1	.....	.....	.....	5	9	16	20	.....
Hare.....	8	20	.....	1	26	.....	23	.....	.....
Miller.....	.....	6	3	8	.....	23	.....	27	.....
McMurtrie.....	22	.....	17	22	.....	16	.....	6	.....
Junkin	29	.....	10	.....	12	.....	2	13	.....
Rawle.....	15	27	.....	15	.....	2	30	.....	11
Penrose.....	.....	13	24	.....	19	.....	9	.....	4

DATES OF DUTIES OF COUNSEL.

	Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
Allison			3				16	20	
Barrett			17				16		11
Bayard			17						
Bennett					19			13	
Biddle		6		15					11
Boudinot	29				12				
Brown		6					23		4
Calhoun		27					16		
Colton				8		16			4
Darling				15					
Easby			3				2		4
Esling	15		24				2		
Evans	15			15		16			
Fell		27				16			
Gendell	15					9	9		
Hays			10			9			
Hazlehurst	22			8			23		
Hepburn		6					2		
Hollingsworth							30		
Horner		27			19		23		
Hunter	29			22			9		
Janvier	22		24			9			
Kendall	15				19				4
Kingston	29				5		30		
Krumbhaar	8					9		13	
Leach								6	
Lennig		20			5		23		
Mays	1				5		2		
McCammon		27							
McCarthy	8			22				27	
Megargee	29					2		27	
Miller		20		22				20	
Montgomery	8			1		23			
Moore			10			23	30		
Morgan	1			1		23			
Morris	15		24			2			
Murphy	22			1		2			
Norris			3		12				
O'Neill	8			1				27	
Outerbridge								6	
Peirce		13			26			27	
Pepper		13			12		30		
Platt		6					9		
Pratt		13			19				
Reed		20			5			20	
Rich			10			2		20	
Ross				22		23			
Sanders	1			8		16			
Saunders		13			26			13	
Sharswood					12				
Smithers					26			6	
Spencer		20			26			13	
Taylor	1			8			9		
Weigley			10				16		11
West			24					6	11
Wetherill			17	15					
Wiltbank			17						

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Marcellus Miller	158 North Ninth street.
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W. W. Wiltbank	219 South Fourth street.

ARGUMENT LIST.

Before the PROVOST.

September 1, 1869.

Anthony Saunders, Assignee of Cyrus Rex, Bankrupt, vs. *Jacob Warner.*	District Court of the United States. Eastern District of Penn'a.

Hearing on Bill and Answer.

The Bill set forth the following facts, viz:

I. That in November, 1868, Cyrus Rex filed his petition in Bankruptcy, under the Act of March 2d, 1867, and that Anthony Saunders, the complainant, was subsequently appointed assignee of said Bankrupt's estate.

II. That in 1860, the father of the Bankrupt Rex, said Rex being then insolvent, died, leaving by his last will unto Jacob Warner, certain real estate yielding an income of $10,000 per annum, "in trust for and to collect the rents, issues and profits thereof, and pay over the same to my son, Cyrus Rex, for and during the term of his natural life, without being subject to his debts and liabilities;" and at his decease, the same to go to the children of the said Cyrus Rex, in fee.

III. That in April, 1869, the said Jacob Warner held as Trustee $5,000 in cash, being the income of said real estate which had accrued since November 1st, 1868.

IV. That the said Jacob Warner has refused to pay over to the complainant the said $5,000, whereto he believes he is entitled under the assignment to him made, in accordance with the Bankrupt law of March 2d, 1867.

And prayed:—

1. That the defendant might be enjoined from paying over the income or profit of said estate or any part thereof, to the *cestui que trust.*

2. That said defendant might be decreed to pay over to the complainant all interest or income now due and in his hands, and all future profits of said estate as the same may become due and payable.

3. General relief.

Taylor, Mays, } For Complainant. *Sanders, Morgan,* } For Defendant.

Before Vice-Provost HARE.

September 8, 1869.

In re Harrison's Estate. } Orphans' Court of Alleghany County. Exception to Auditor's Report.

The facts of this case were as follow:

Mary Harrison, who at the time of her death was the wife of William Harrison, died in February, 1867, seized as her separate estate of a tract of land in Alleghany County. Said tract of land was afterwards sold by her administrator, under an order of the Orphans' Court, for the payment of debts. The distribution of the proceeds of said sale was referred to an Auditor.

Amongst the claims presented before the Auditor against this said separate estate of Mary Harrison, was one by Henry Graham, amounting to five hundred dollars, for drainage pipes and work and labor done. The claimant offered to prove that the pipes were laid on the said tract of land, the separate estate of said Mary Harrison, and were furnished and used in obedience to a written order from said decedent.

The Auditor rejected the evidence, and refused the claim of Graham. Graham excepted.

O'Neill, *McCarthy*, } For Exceptant. *Krumbhaar*, *Montgomery*, } Contra.

Before Vice-Provost RAWLE.

September 15, 1869.

John Pratt vs. *James Spencer and Thomas Wyatt, Trustees, etc.* } Supreme Court. In Equity.

Hearing on Bill and Demurrer.

The Bill set forth the following facts:

I. In 1868 Robert Bohlen died, having by his last will and testament duly acknowledged and recorded, bequeathed *inter alia* $10,000 to the defendants *in trust*, as follows:

"For John Pratt for life, and after his decease, in trust to assign and make over the same unto and equally amongst *such* child or children of the said John Pratt (being a son), as should attain the age of 25 years, the right or share of such child or children to be a vested interest and transmissible to his or their

personal representatives, notwithstanding his or their subsequent death in lifetime of said John Pratt. The testator gave to the trustees full power during the minority of the children, to apply and dispose of all or any part of the income of his or their *expectant* share of or in the said securities, for or toward their respective maintenance or education, and as to any surplus, to invest the same in like securities together with the interest of the accumulations, and to stand possessed of all such accumulated securities in trust, for the person or persons who shall be ultimately entitled to the principal, and if there should be no son who should attain the age of 25 years, then the trustees were to pay over the said securities and accumulations to said John Pratt."

II. That at the testator's death, the said John Pratt had three sons living—one aged twelve years, one seven years, and one two years.

III. That the plaintiff, having been informed and believing that the limitation in the will of the said Robert Bohlen, as herein set forth in favor of his the said plaintiff's sons, was void, had asked the said defendants, the trustees in the said will named, to transfer the principal of said trust to him the plaintiff, which the said trustees had refused to do.

And prayed—

1. That the trustees be decreed to transfer the said sum to the plaintiff.

2. General Relief.

The Defendants demurred.

Evans, *Morris*, } For Demurrer. *Esling*, *Kendall*, } Contra.

Before Vice-Provost McMURTRIE.

September 22, 1869.

Reilly vs. *Field.* } Supreme Court at Nisi Prius.

In Equity.

Hearing on Bill and Answer.

The Bill alleged—

I. That on the 7th December, 1865, William Rhodes executed a mortgage on certain property to the plaintiff, to secure the payment of two notes for $8,000 each.

II. That one of these notes was paid at maturity by the defendant, the plaintiff in consideration thereof, agreeing (verbally) to give him one-half interest in the mortgage.

III. That the defendant agreed to have the mortgage sued out; suit was brought in the name of the plaintiff, who, for convenience, gave the defendant an order to mark the suit to his use; and the property was sold by the Sheriff, January 3, 1867, for $5,000.

IV. That the bid was settled for by plaintiff receipting on the mortgage for $2,000, Field advancing the balance, $3,000, which was appropriated to the payment of taxes, arrears of ground rent, costs, &c., and the Sheriff's deed was made to Field.

V. That the plaintiff had offered to refund to the defendant the excess over the one-half of the bid which he had paid, viz. the sum of $1,500, defendant having advanced $3,000 in cash, and had requested him to execute a conveyance of the one-half of the premises, which he had refused to do.

VI. That at time of the Sheriff's sale, there had been a verbal understanding between the parties that the premises should be purchased on the joint account of both, each taking an equal share.

The Bill then prayed--

1. That defendant should be decreed to execute a conveyance of one-half of said premises to the plaintiff.

2. Further relief.

The Answer admitted facts set forth, and averred defendant's willingness to convey all the interest that he was informed and believed the plaintiff was entitled to in the said premises, viz: an undivided one-fifth of the same, alleging that plaintiff had paid only the one-fifth of the purchase-money, viz. the half of the amount receipted for on the mortgage, he having only the one-half interest in the mortgage.

Hazlehurst, Gendell, } For Complainant. — *Murphy, Janvier,* } For Defendant.

Before Vice-Provost JUNKIN.

September 29, 1869.

Moore vs. *Hunter.* } Supreme Court. Error to District Court of Philadelphia County. Ejectment.

This was an action of ejectment brought by Thomas Moore, Trustee of Janet Blair, under the will of James Hepburn, deceased, to recover possession of certain premises situate at N. E. corner of Broad and Poplar.

The following facts appeared in evidence at the trial:

James Hepburn died December 1, 1845, seized *inter alia* of the real estate, the subject of the present ejectment. By his last will and testament dated March 1, 1844, and proved Decem-

ber 6, 1845, he devised the said premises "unto Thomas Moore, his heirs, executors, administrators and assigns, in trust, nevertheless, for the sole and separate use and benefit of my beloved daughter, Janet Hepburn; the said Thomas Moore, his heirs or assigns, to collect and receive the rents, issues, and profits of the said real estate, and immediately after my decease, after paying the taxes and all other charges against the said estate, to pay over the whole of the said income or product of the said premises, to the said Janet Hepburn, for her sole and separate use during the term of her natural life, without the control or interference of, any husband whom she may hereafter take, and without being liable for his debts or engagements, and her receipt alone, whether she be covert or sole, to be a sufficient discharge therefor," with a power of appointment to the said Janet Hepburn, by will, and in default of appointment, to her children, should she have any.

Janet Hepburn intermarried with John Blair, two weeks after the death of her father, James Hepburn, who left no widow, nor any children excepting the said Janet.

And she, her husband joining in the conveyance, conveyed the said premises to Wm. Hunter, the defendant below, for a valuable consideration.

The judge charged the jury that the above trust was not binding, and that therefore the defendant's title was good.

Plaintiff excepted.

Jury found for defendant.

Plaintiff sued out the writ of error, assigning as error the charge of the Court below.

Megargee, *Hunter*, } For Plaintiff. *Kingston*, *Boudinot*, } For Defendant.

Before Vice-Provost MILLER.

October 6, 1869.

In the Matter of the Will of Malcolm MacIntyre, deceased.	Register's Court of Philadelphia County.

Sur application for feigned issue.

The will of the decedent was admitted to probate March 7th, 1867. A paper was filed with the Register, September 7th, 1867, contesting, for reasons therein set forth, the validity of said will. The Register having appointed a Register's Court, the parties proceeded, under a proper rule, to take such testimony as they desired to submit, under Section 41 of the Act of March 15th, 1832. (*Purdon, p.* 861; *pl.* 21, 22, 23).

The will gave to Margaret MacIntyre, who was his niece, and only heir-at-law, a legacy of $300, and the whole of the residue of his estate, amounting to over $500,000, to a Library Company, to be conducted on certain principles therein detailed.

The evidence, as reported by the Examiner, was in substance as follows:—The decedent had always been a man of large fortune, and a bachelor, and had died in his sixty-ninth year. His will was dated November 3d, 1864. Up to the age of forty-eight he had always led a highly estimable life. At that time, and at subsequent intervals of two or three years, he had had epileptic attacks. His moral disposition had, since that date, undergone a change—aggravated considerably in degree

towards his death. He appeared to take great pleasure in the pain and misfortunes of those around him, and had been guilty, latterly, of malicious cruelty to animals, in directly causing such pain. Several instances were given, in which he had raised the expectations of people and former friends, by promising to obtain for them certain situations (which his influence might readily have commanded), and had disappointed them purposely, as he admitted, for the pleasure of annoying them. He was also proved to have become latterly addicted to low and immoral habits, in which he had never previously indulged, and in all of the above instances, to have exhibited no sense of moral compunction whatever.

He had requested his niece, who was his only near relative, to live with him, declaring that he would handsomely provide for her at his death, and she had done so for five years previous to his decease. It was also proved that the decedent was formerly of a most benevolent disposition, but had at times latterly exhibited great and unusual severity towards his niece, who was a highly amiable woman, and had spoken of cutting her off without a penny—*as a good joke.*

There was no evidence in his will of mental derangement, but on the contrary, indications of great acuteness of mind. Experts, in every way qualified, who were called by the contestant, testified that they had no doubt that the defendant was laboring under moral insanity, and others, on the part of the Executors, that he was a perfectly sane man.

The case came up for argument on the above facts.

Brown, *Biddle*,	For Contestants.	*Hepburn*, *Platt*,	Contra.

Before Vice-Provost PENROSE.

October 13, 1869.

Williams, McDonald & Co. vs. *George Seely, Assignee in Bankruptcy, of Adam McNaughton.*	Circuit Court of the U. S. Error to D. C., U. S. for the E. D. of Penn'a.

Narr. contained two counts in Assumpsit, each on Bill of Exchange for $3,000, drawn by James Steele on, and duly accepted by, bankrupt, and subsequently endorsed over to plaintiffs, who are the present holders.

Plea "Payment with leave," etc.

On trial it was stated that the action was maintained under Section 24 of Act of March 2, 1867. (*Bankrupt Law.*)

The facts proved were as follow: James Steele, a woolen manufacturer, had drawn three bills for $3,000 each, at thirty days, three and four months respectively, on McNaughton, who accepted the same. Payment was refused on the first, when the holders, the plaintiffs, sued both acceptor and drawer, and obtained judgment on the first note. McNaughton immediately afterwards became an involuntary bankrupt, and plaintiffs then wrote to drawer, proposing settlement. Steele then offered by letter, to pay $1,000 cash, and manufacture woolen goods for plaintiffs, raw material to be supplied by them, at his factory, at regular market prices, until the value of the work thus done at such rates, should be $8,000—"*the above to be in full satisfaction of the note now due, as well as of the other two* (describing them) *you hold.*"

Plaintiffs (by letter) agreed to the terms proposed, and received $1,000 cash. It also appeared by James Steele's account

books, that plaintiffs had received some $4,500 in work done under the above agreement.

The Court instructed the jury under the above facts to find for the defendant.

Plaintiff appealed and removed cause to the Circuit Court, as directed by Section 24 of Act of March 2, 1869. It was then agreed that the pleadings remain the same, and that if the Court shall be of opinion that the above facts constitute a valid defence at law, judgment to be entered for defendants; but if otherwise, judgment for plaintiffs for whole amount claimed, with interest, or so much thereof, as in the opinion of the Court, they are at law entitled to recover.

Pratt, *Pepper*, } For Plaintiffs.

Peirce, *Saunders*, } For Assignee.

Before Vice-Provost HARE.

October 20, 1869.

Johnson

vs.

The Insurance Company.

District Court.

Motion for a New Trial.

Covenant.

This was an action on a Policy of Insurance by which the defendants had insured the ship "Tiger," for three years from July 1st, 1867. The Policy was in the ordinary form—against Marine risks, losses by fire, &c.

Plea.—That the plaintiff, knowingly, wilfully, and improperly, had sent the vessel to sea in an unseaworthy condition,

whereby the vessel was obliged to stop at the Port of Charleston, S. C., for repairs, and while remaining there, at anchor, a storm having arisen, the ship foundered, and *by reason of the* premises, became wrecked and wholly lost, &c. Issue.

On trial the evidence was that the ship was on a voyage from Philadelphia to Rio Janeiro, Brazil; that she left the Port of Philadelphia in an unseaworthy condition, and was therefore compelled to stop at the Port of Charleston for repairs, where she would not otherwise have stopped; that while there, a sudden gale having arisen, part of the anchor tackle broke, and being loosed from her moorings, she was driven against a small rocky island in the harbor of Charleston, and became a total wreck. The accident to the anchor tackle was not connected with the cause of unseaworthiness, and it was admitted that the breakage of that particular tackle might have happened, had the vessel been perfectly seaworthy.

The judge charged the jury that the unseaworthiness of the vessel at the time she was sent to sea, was no defence *per se*, but declined to charge, as requested by defendants, that if the jury believe the fact of unseaworthiness was not the *proximate and immediate* although the *ultimate* cause of the loss, the plaintiff cannot recover.

Jury found a verdict for plaintiff.

Defendants then moved for a New Trial.

The reasons assigned were,

1. The refusal of the learned judge at the trial to charge as requested by defendants; and

2. That the finding of the jury was contrary to the evidence.

Spencer, *Reed*, } For Motion. — *Miller*, *Lennig*, } Contra.

Before Vice-Provost RAWLE.

October 27, 1869.

Moore	}	Supreme Court.
vs.		Error to
Allen.	}	Common Pleas of Chester County.

Assumpsit.

The Narr. averred that the plaintiff had been induced to enter into a written contract with a certain John Curley, for the lease of certain premises in the town of Chester (describing them), for the period of five years from June 1, 1869, upon the undertaking and promise of the defendant that he had authority from said Curley to make such lease. That the defendant had not regarded his said promise, but deceived the plaintiff, in that he had no authority to make such lease, whereby the plaintiff had suffered damages, &c.

Pleas—Non assumpsit. Payment with leave, &c.

Upon the trial, the following facts were proved, viz.—A lease in the usual form, dated December 31st, 1868, between John Curley, owner of the premises described in Narr. and the plaintiff, for the lease of said premises for five years from January 1st, 1869, at $500 per annum, signed by the plaintiff and by the defendant, the defendant signing thus—

"JOHN CURLEY.

By his Agent, A. ALLEN."

That A. Allen had no authority to act as the agent of Curley, in making a lease for such a length of time; but that he acted under the impression that he had such authority, arising from a misunderstanding of instructions given him by Curley, in regard to said property.

The Court instructed the jury that if they believed the evidence they ought to find a verdict for the defendant.

Plaintiff excepted to the charge.

Jury found for the Defendant.

Plaintiff sued out this writ of error, assigning as error the charge of the Court below.

Fell, *Horner*,	For Plaintiff.		*McCammon*, *Calhoun*,	For Defendant.	

Before Vice-Provost **MILLER.**

November 3, 1869.

Satturthwaite vs. *James Stryker and Mary Stryker, his Wife.*	District Court. Demurrer.

Case.

The *Narr.* set forth that one Williams, being possessed of a certain promissory note (describing it), for $1,000, drawn by himself, and purporting to be endorsed by James Stryker, the defendant, applied to plaintiff to discount it; and that when he so applied to plaintiff, the said Mary, knowingly, wilfully, and fraudulently, and with intent, &c., did declare that the said endorsement was that of her husband, the said James Stryker, and that he was liable thereon, and that in consequence of said representations, he discounted the said note for the said Williams, whereas the said endorsement was not in truth that of the

defendant James Stryker, but was a forgery, which was well known to the said Mary at the time of making said representations, and averred that the defendant James Stryker, had refused to pay the note when presented, to the great damage, &c.

First Plea,—that the defendant Mary was at the time of making the said representations, the wife of the said James Stryker.

Second Plea,—that the defendant Mary was at the time the wife of the defendant James Stryker, and that the defendant James Stryker had never known of, nor authorized, nor had been privy to, said representations.

To the First Plea, plaintiff demurred specially, assigning as cause, that the said plea is insufficient and bad in law, in that—

1. It does not either traverse or confess and avoid.

2. It alleges that the coverture of a married woman is a just and sufficient defense to the fraudulent representations averred in the Narr. Joinder.

To the Second Plea, demurrer generally, and also for cause [2] above assigned, and in that it alleges that a husband is not liable for the *torts* of his wife. Joinder.

Norris,
Easby, } For Demurrer.

Bennett,
Allison, } For Defendants.

Before Vice-Provost JUNKIN.

November 10, 1869.

Chapman vs. *Raguet's Administrators.*	Orphans' Court. Sur report of Auditor.

This was a claim of $833, for work and labor done, and materials furnished by plaintiff, a mechanic, to the decedent and Lemuel Haines, as copartners in the building of certain houses.

Before the auditor it appeared that in April, 1866, decedent had entered into a contract with Haines, a builder, by which Haines covenanted to erect forthwith, five houses of a specified description, on five lots of ground in West Philadelphia, then owned by Raguet, and to sell the same as finished, to such purchasers, and on such terms as he should deem most advantageous, half cash to be paid down, balance secured by mortgage; Haines to have complete control of erection and sale; Raguet to join, when and as requested, in all needful deeds and assurances, to convey a marketable title; in consideration of which, it was stipulated that twenty-five per cent. of the amount received by Haines for each house and lot, free from encumbrance, should be paid in cash to Raguet, as each was sold.

Under this contract, which was never put on record, Haines erected the houses, and in January, 1868, sold two of them for $10,000 each, half cash, and paid $2,500 cash on each to Raguet. The others remained unsold. In June, 1868, Raguet died, and in December, 1864, Haines became an involuntary bankrupt.

In effecting the sales of the two houses sold, it appeared that Haines had obtained from Chapman, the claimant, a release of his lien for work and labor done, in order to convey the same clear of incumbrance, promising to see the same paid shortly. It also appeared that in the deeds to the purchasers, Raguet was the only grantor mentioned.

The Auditor decided that Claimant had shown no privity of contract between himself and Decedent, and that the facts proven were not such as to constitute a partnership, and accordingly ruled out the claim.

To this ruling the Claimant filed exceptions.

Rich, *Weigley*, } For Plaintiff. *Hays*, *Moore*, } For Defendants.

Before Vice-Provost McMURTRIE.

November 17, 1869.

Hotson vs. *Jordan et al., Trading as the Manayunk Paper Company.* } District Court. Motion for Nonsuit.

Assumpsit.

Thomas Wurtz and William Wurtz carried on business as paper manufacturers at Manayunk, under the name of "The Manayunk Paper Company." In the year 1862, being involved in difficulties, they executed a deed under which all their property was conveyed to trustees for the benefit of their creditors.

The deed was dated September 12th, 1862, and purported to be between Thomas and William Wurtz, of the first part, certain parties of the second part, named as trustees, and all the creditors of Thomas and William Wurtz, of the third part, among whom was the defendant, Jordan. The names and claims of the parties of the third part, were set forth in a schedule thereto attached.

The deed recited—that the parties of the first part had for some time past carried on business under the name of "The Manayunk Paper Company;" that they were jointly indebted to the parties of the third part in the sums set opposite their respective names in the schedule underwritten, and that the parties of the first part had agreed to assign all their estate and effects to the parties of the second part, upon the trusts thereinafter mentioned.

The Indenture then witnessed, that the parties of the first part, in consideration of the premises, did assign unto the parties of the second part, their heirs, executors, administrators and assigns, all their estate and effects (describing them), upon the trusts thereinafter expressed. The trustees were appointed attorneys for the Wurtzes to get in their debts, &c.

And it was thereby agreed and declared, that the said trustees should be possessed of the property assigned—upon the *trust* that they and their assigns "*should continue and carry on, under the name of 'The Manayunk Paper Company,' the business heretofore carried on by the said Thomas Wurtz and William Wurtz*" (full power, in detail, was then given them for this purpose), and "*should pay and divide the net profits of the said business unto and among all the creditors of the said Thomas Wurtz and William Wurtz, in ratable proportions,*

according to the amount of their respective debts at the end of each year"—subject to the provisions thereinafter contained,—that in distributing the said net income, the same should be deemed as the joint property of the parties of the first part. And it was thereby agreed, that upon the request of any two or more creditors, whose debts should amount together to $10,000, the trustees should call a meeting of creditors, and at such meeting *a majority in value of the joint creditors should have full power to alter or change the mode of conducting the business, or to wind it up altogether.*

In June, 1864, the plaintiff sold and delivered to the Company, defendant, at Manayunk, a large quantity of rags, worth some $3,000. He received $1,000 on account, and on October 10th, 1864, drew upon the Manayunk Paper Company for $2,000 (that being the balance due), at sixty days. The draft was accepted, "For the Manayunk Paper Company,—John Thomas." John Thomas was one of the trustees and the financial manager of the company. The draft was dishonored and paid by the drawer. Jordan had received, under the provisions of the said deed, about $500 in all, on account of the debt due him by the Wurtzes, from the net profits of the company, the last payment having been made in January, 1864, and there was still unpaid of his original claim, $2,000.

This Bill having been dishonored, the plaintiff brought this action of assumpsit. The defendant, Jordan, pleaded specially, denying that he had accepted the Bill, and filed at the same time an affidavit denying that he was a partner in the said company. Issue was joined on this plea. On the trial, the above facts were proved, and the deed offered in evidence by

the plaintiff, who then closed. The defendant moved for a Non-suit.

Bayard, *Wetherill,*	For Motion.	*Barrett,* *Wiltbank,*	Against Motion.

Before Vice-Provost PENROSE.

November 24, 1869.

James Root
vs.
Thomas Dixon.

Supreme Court.

Error to District Court.

Assumpsit.

The following were the facts of the case:

In July, 1869, the defendant, an auctioneer, was about to sell the personal property—goods, furniture, &c.—of Wm. Wood, who occupied a house belonging to the plaintiff, where the property to be sold was located. The premises were held by Wood, under a lease from Root, from year to year, the rent being due and payable on the first days of September and March of each year. The rent due and payable March 1st, 1869, had not been paid. The plaintiff demanded security for his rent, and threatened a distress; the defendant, in consideration of the plaintiff's not distraining and permitting the sale to go on, *verbally* promised to pay the rent already due, and also the *rent to become due*. The plaintiff did not distrain, and the sale proceeded. The defendant, when duly called upon by the plaintiff, refused to pay any of the rent. The plaintiff then brought this

suit, and upon the trial, offered a witness to prove the above *verbal promise* of the defendant. The offer was objected to, and the testimony ruled out. The Plaintiff excepted.

The Judge below charged the jury, that the promise of the defendant was void.

The Plaintiff excepted.

The jury found for the Defendant.

The Plaintiff sued out this writ of error, assigning as error the ruling of the Court, in rejecting the evidence of a *verbal promise* of the Defendant, and also the charge of the learned Judge below.

West, *Morris*, } For Plaintiff. *Esling*, *Janvier*, } For Defendant.

Before Vice-Provost **HARE**.

December 1, 1869.

United States vs. *John Duprez.* } Circuit Court of the United States. Eastern District of Pennsylvania. April Term, 1870.

Hearing on Return to Writ of *Habeas Corpus*.

The defendant had been committed on a charge of High Treason against The United States.

The Return to the Writ set forth that in 1849, defendant had entered on board a Mexican Privateer, "in parts out of the jurisdiction of the United States, and that having so entered, he aided in capturing an American vessel;" that he had in the

same year become a fugitive from justice, and had been arrested on his return to the United States in the year 1869, and held for trial. It was objected for the prisoner that he was not liable to the charge of High Treason, because he was not a citizen of the United States.

The facts were these :—

John Duprez was a resident and native of Mexico. His parents were citizens of the United States, born subsequently to 1802. John was born in Mexico in the year 1827, and continued to reside there up to 1848. In 1845 his parents returned to this country—his mother dying in 1845 and his father in 1846.

In 1849, he entered on board a Mexican privateer, and assisted in the capture of an American vessel, which was afterwards libelled and condemned.

The whole case turned upon the following question :—

Whether a person born abroad as aforesaid, of parents who were citizens of the United States born here subsequently to 1802, is a citizen of the United States, so as to be liable to a prosecution for High Treason.

O'Neill, *Morgan*, } For Prisoner.

Murphy, *Montgomery*, } For United States.

Before Vice-Provost MILLER.

December 8, 1869.

Joseph Jamison, Trustee named in a certain Indenture of Mortgage executed by the R. R. Co., and Jacob Tack,
vs.
The R. R. Co.

Supreme Court.

Appeal from Decree at Nisi Prius.

The Bill set forth—

I. Act of Incorporation of R. R. Co., by which *inter alia*, Company was authorized to borrow money to amount of $1,000,000, and to issue bonds therefor, &c., and to secure the same by a mortgage of all the property, real and personal, now held or hereafter to be acquired, and of all the corporate franchises.

II. That in pursuance of these powers, the Company did borrow money to the extent of $1,000,000, issuing their bonds therefor, payable January 1, 1869, to complainant Jamison, or bearer, and secured the same by a mortgage to him as trustee.

III. That the bonds and mortgage contained the following covenants:—

(*a*) That in default of payment of interest, the Trustee should enter upon and take possession of the mortgaged property and run the road, applying the revenues thereof to the payment of interest on said bonds.

(*b*) That the holder of these bonds might at any time after Jan. 1, 1868, convert the same into the capital stock of the Company *at par*.

IV. That the complainant Tack was the holder of $100,000 of said bonds.

V. That by a supplement to their charter, the Railroad Company were authorized to borrow $250,000, and to issue bonds and secure the same by mortgage, on the property and corporate franchises of the Company; and had accordingly borrowed said sum, issuing bonds secured by a second mortgage.

VI. That on default of payment of interest on second mortgage bonds, the trustee, by virtue of powers therein, entered upon and and took possession of the mortgaged property, and sold the same to several parties, who thereupon became the corporation defendant, and were now in possession, continuing business in the same name. [*Under Act of April* 8, 1861, §§ 1, 2; *P. L. p.* 259 *Purdon, p.* 300, *pl.* 43–4.]

VII. That interest overdue for some time past on the first mortgage bonds had not been paid, and that the defendants refused to allow the complainant Jamison to enter, &c., or to allow the complainant Tack to convert his bonds into stock, at par.

The Bill prayed:—

1. Decree authorizing complainant Jamison to enter upon mortgaged property.

2. Decree compelling defendants to allow complainant Tack to convert his bonds, or any portion of them, into the capital stock of the company at par.

3. Further relief.

Demurrer for want of equity.

Decree dismissing Bill, from which complainants appeal.

Taylor, *Sanders*, } For Appellants.

Hazlehurst, *Colton*, } For Appellees.

Before Vice-Provost **RAWLE.**

December 15, 1869.

Charles Gilman and William Whitney, Trustees, &c.,
vs.
John Moss.

Supreme Court.
Error to District Court.

Ejectment.

The Plaintiffs claimed title under a deed from John Brinton, dated January 1st, 1866, and recorded the same day, by which he had conveyed the real estate in question to plaintiffs, in trust for the sole and separate use of his wife, Margaret Brinton, free from the debts or control of her present or any future husband, during her life, and after her death to stand seized to the use of her issue by this marriage, remainder to her heirs generally.

The recitals in this deed, stated that it was made in pursuance of an antenuptial parol agreement with the said Margaret Brinton, then Margaret Williams, to settle this property, which consisted of a dwelling-house, upon her, on their marriage, which took place in December, 1865.

It was proved on trial, by evidence *aliunde* the deed, that a parol agreement to settle this property had been made between the parties, as stated in the deed, on or about the 3d of May, 1865, and that it had been made in consideration of marriage; that subsequently and before his marriage, Brinton had contracted debts to a considerable amount. Defendant claimed title under Sheriff's sale of premises under execution, returnable to March Term, 1867, on a judgment against Brinton for one of the

debts so contracted. The judgment was not obtained until after the execution of the deed.

The Judge charged the jury, that "a post-nuptial settlement, made in pursuance of, and reciting, an antenuptial parol agreement so to do, is void as against creditors existing at the time of the settlement, and therefore that plaintiffs had failed to show a sufficient title in themselves."

Plaintiffs excepted.

The jury found for Defendant.

Plaintiffs sued out this writ of error, assigning as error, the charge of the learned Judge in the Court below.

Wetherill, *Biddle*, } For Plaintiff. *Evans*, *Darling*, } For Defendants.

Before Vice-Provost McMURTRIE.

December 22, 1869.

Peck vs. *Betts.* } District Court.

Assumpsit. Point reserved.

Pleas,—Non-assumpsit, Payment with leave, &c.

This was an action on a promissory note. The note was for $1,000, payable to John Peck or order, at ninety days. It was made by Wm. Thomas, dated June 1, 1864, and endorsed by Henry Betts, the defendant.

The defence to the action, under the plea of payment with leave, &c., was, that the endorsement was without consideration

and entirely for the accommodation of the maker, of which the holder and payee had notice, and that before the note fell due, the plaintiff, who was then the holder of the note, had agreed with the maker of the note, by articles in writing and under seal (which were put in evidence), not to sue upon the note at maturity, but to give the maker thirty days' time in which to meet its payment, in consideration of having certain collaterals (stocks, &c.) placed in his hands as security for the debt. The deed contained a clause reserving in a clear and unqualified manner to the holder of the note, the right to pursue all his remedies against the endorser, Betts. Upon the failure of the maker to take up the note at the end of the thirty days, the security held by him having become worthless, the holder brought this suit against the endorser. Upon this state of facts, the Court ordered the jury to find for the defendant, reserving for the consideration of the Court in Banc the question of the discharge of the defendant from his liability as endorser, by the execution of the above deed between the holder and maker of the note.

The question now comes up before the Court in Banc.

Miller, *Hunter*, } For Plaintiff. *Ross*, *McCarthy*, } For Defendant.

Before the PROVOST.

January 5, 1870.

Wilkins, Derborrow & Co.	District Court.
vs.	Point Reserved.
Letellier.	Motion for Nonsuit.

Trover.

This was an action of trover for the ship, "The Brigand," an English vessel, of which Allan Goldthwaite was from 1865 to 1867 the registered owner. In 1867, the ship was sent on a voyage to Jamaica by Goldthwaite, under the command of James Hadley. While the ship was on the voyage, she was sold by Goldthwaite to Messrs. Wilkins, Derborrow & Co., the plaintiffs, and duly transferred, and the sale registered in accordance with the requirements of the English law. On her return from Jamaica, when the vessel arrived at the port of Brest, Goldthwaite then having become insolvent, a Bill of Exchange for £400, duly accepted by Goldthwaite, and then held by one Lyman, was endorsed to Perez & Co., a French firm in Brest, to collect. Suit was immediately commenced on the Bill, against Goldthwaite, who, as well as his assignee in bankruptcy, was duly notified. No notice was given to Wilkins, Derborrow & Co., it not being necessary by the law of France, that they should be notified, the transfer, of course, not appearing upon the ship's papers. A decree and judgment against Goldthwaite was duly made by the Tribunal of Commerce of Brest. The ship was *then* seized, and certain proceedings *against the ship* being taken, the vessel was sold under them, after the judgment

of the Tribunal of Commerce was confirmed by the Civil Tribunal of the District, in accordance with the French law.

The defendant Letellier, became the purchaser.

The vessel was subsequently sent to Philadelphia on a voyage, by Letellier, the defendant, and the plaintiffs, the registered owners in England, commenced these proceedings in order to recover possession of the ship. On trial the above facts were fully proved, and testimony of experts taken, as to the law of France, which was, briefly as follows :—

No transfer of a vessel can take place while the vessel is on her voyage, to the prejudice of creditors, *or* without such transfer appearing on the ship's papers. The sale of a ship by the owner to a third party does not prejudice the right of the creditor ; and the creditor is entitled, after an order made by the Court for payment, or payment not being made, to have the ship seized, and on proper proceedings (here fully complied with), to an order for condemnation and sale.

The seizure of the vessel and subsequent condemnation and sale, are proceedings entirely distinct from those against the debtor, and are, in form, *in rem*, being merely to enforce payment of what is by the Law of France, a lien against a personal chattel, and are binding against all parties.

The Judge directed the jury to find for the plaintiffs, with leave to defendants to move for a nonsuit, reserving the point whether the courts of this country will give effect to a judgment *in rem.* of a foreign tribunal, where the proceedings are primarily *in personam*, and only incidentally *in rem.* and where the *lex loci contractus* is either misconceived or disregarded.

Defendants now moved for leave to enter a Nonsuit.

Reed, *Mays*, } For Nonsuit.

Kingston, *Lennig*, } For Defendant.

Before Vice-Provost JUNKIN.

January 12, 1870.

Henderson
vs.
Burns.

Supreme Court.
Error to District Court.

Assumpsit.

Action on promissory note for $1,500, drawn by Burns to the order of Henderson, dated Nov. 1st, 1868, at four months.

Plea, "Payment with leave," &c.

The plaintiff proved demand and refusal to pay.

Under notice of special matter, defendant offered in evidence a contract, dated May 1st, 1868, between himself and Henderson, who was a builder, for the erection of a three story brick house with back buildings, after certain specified plans and drawings therein contained; said house to be completed February 15th, 1869; payment therefor to be made in four promissory notes of $1,500 each, as follow, viz: one on Nov. 1st, 1868, one on February 15th, 1869, one on June 15th, 1869, and one on Oct. 1, 1869, all at four months.

The defendant then proved that Henderson commenced to build in August, 1868, but that in January, 1869, the house not then being nearly completed, he had stopped all work, and that nothing had been done from that time forth by the plaintiff towards finishing the house.

The plaintiff in rebuttal offered evidence to show that the value of the work and labor done and materials furnished upon the house, amounted to over $4,000, and that the defendant had

proceeded to complete the house, using the work and materials furnished by the plaintiff. He also offered to prove that at the time he ceased working on the house, there was a wide-spread epidemic prevailing in the city, to escape which hundreds of people were going away daily, and that he himself had been attacked by the disease, and only recovered after having been confined to his bed for six weeks. The Court upon objection, refused to admit the evidence, and sealed a Bill of exceptions. There was no evidence that Henderson had offered to complete the building.

The Judge charged the jury that, where a contract is entire —before any recovery can be had of the consideration money, the plaintiff must prove that he has performed or has been ready to perform his part of the contract,—or that performance has been prevented by the defendant; and that as the note in suit was part of the consideration expressed in the contract, the defence set up was good as between the parties.

The Plaintiff excepted to the charge.

The jury found for the Defendant.

The plaintiff sued out this writ of error, assigning as error—the ruling of the Court below in rejecting the evidence as above, and the charge of the learned Judge.

Norris, *Boudinot*, } For Plaintiff.

Sharswood, *Pepper*, } For Defendant.

Before Vice-Provost PENROSE.

January 19, 1870.

Wm. Brown vs. *Jonas Brown.* } Supreme Court. Error to Common Pleas.

Ejectment.

The plaintiff claimed under the will of Jonas Brown, the grandfather of the defendant and himself, dated January 1, 1861, duly proven, etc., whereby *inter alia* the testator devised the land, for which suit was brought, "to my son Henry Brown, for life, and immediately upon the decease of the said Henry, unto Jonas Brown, eldest son of the said Henry, in fee."

At the time of making the will, Henry had issue, by a first marriage, Wm. Brown, the plaintiff, and by a second marriage, Jonas Brown, the defendant.

Plaintiff's counsel offered in evidence, the declarations of the testator after the making of the will, and his instructions therefor, to show intention.

The Court refused to admit the evidence, and sealed a Bill of exceptions.

Bennett, *Horner*, } For Plaintiff. *Pratt*, *Kendall*, } For Defendant.

Before Vice-Provost HARE.

January 26, 1870.

Elkirk vs. *Telegraph Company.* } Supreme Court. Error to District Court.

Case. Plea, "Not Guilty."

The facts of this case appeared in evidence, as follow:—

The Telegraph Company owned a line of wires from Philadelphia to Pittsburgh. They advertised on printed handbills and on their telegraph blanks, as follows: "Telegraphic communications through connecting lines with Chicago, St. Louis, San Francisco, and all principal points West and South-west."

The plaintiff, Elkirk, delivered to defendants' operator in Philadelphia, for transmission to San Francisco, paying full price for its transmission to said place, the following message:

"Buy 6,000 bushels of wheat at not more than 25 cents per bushel, and ship at once."

LEOPOLD ELKIRK.

To JAMES FELTON & Co.,

San Francisco."

At Pittsburgh, the terminus of the defendants' line, their operator delivered the correct message to the operator of the line to San Francisco. At San Francisco the message was received as follows:

"Buy 60,000 bushels of wheat at not more than 35 cents per bushel, and ship at once."

LEOPOLD ELKIRK.

To JAMES FELTON & Co.,

San Francisco."

Felton & Co. acted upon these instructions, and bought 60,000 bushels of wheat at 30 cents per bushel. On learning by letter the mistake of the telegram, and receiving further instructions from Elkirk, they sold the wheat at the highest market price, at a total loss of $2,600, to recover which, suit was brought by the plaintiff.

The judge charged the jury that the Telegraph Company were responsible only for correct transmission of messages over their own line, from Philadelphia to Pittsburgh.

Plaintiff excepted.

Jury found for Defendant.

Plaintiff sued out this writ of error, assigning as error the charge of the Court below.

Smithers,
Saunders, } For Plaintiff.

Spencer,
Peirce, } For Defendants.

Before Vice-Provost RAWLE.

February 2, 1870.

Elphinstone
vs.
Legrand. } Supreme Court.
Certificate from *Nisi Prius.*

This was an amicable action, and case stated between Thomas Elphinstone and Louis Legrand.

The defendant contracted in writing with the plaintiff, to purchase certain real estate in the City of Philadelphia. During the transaction, certain doubts arose as to the plaintiff's title to the premises in question. The plaintiff claimed title under

the will of Archibald Mowbray, his great uncle. Mr. Mowbray died in 1858, and by his last will, dated June 14th, 1857, and duly executed, devised, *inter alia,* as follows:—

"3. And as to my property in Walnut street" (being the property in question), "I do hereby devise the same to my trustees hereinbefore named, in trust nevertheless to permit my nephew, Thomas Elphinstone, to receive the rents, issues and profits thereof during the term of his natural life, and after his decease, in trust for the heirs male of his body, or of such of them, and in such shares or proportions as the said Thomas, *their father*, shall by his last will in writing or paper in the nature thereof, duly appoint."

It was contended by the defendant that under the above devise, plaintiff took only an estate for life.

The question submitted was, whether, under the circumstances, the plaintiff took an estate tail, expanded by the Act of April 27, 1855, into a fee, or merely a life estate.

Judgment at Nisi Prius was rendered *pro forma* for defendants. This was assigned for error.

Rich, *Morris*, } For Plaintiff.

Murphy, *Megargee*, } For Defendant

Before the PROVOST.

February 9, 1870.

Mary Henderson vs. *George Willard.* } District Court. Demurrer.

Assumpsit.

Declaration on an agreement between plaintiff and defendant, to marry one another within a reasonable time. Averment: that a reasonable time had elapsed, and plaintiff had always been ready and willing to marry the defendant, whereof he had notice. Breach: that defendant neglected and refused to marry plaintiff.

Plea. That after the agreement, and before any breach thereof, "defendant became and was, and thenceforth hitherto has been, and still is, afflicted with a dangerous bodily disease, which has occasioned frequent and severe bleeding from his lungs, and by reason of which disease defendant then became and was, and from thenceforth hitherto has been, and still is incapable of marriage without great danger to his life, and therefore unfit for the married state."

The plaintiff demurred, for the reason that the defence set up in the plea was insufficient in law.

Krumbhaar, *Janvier*, } For Demurrer. *Hays*, *Gendell*, } Contra.

Before Vice-Provost McMURTRIE.

February 16, 1870.

The Commonwealth ex rel. John R. Yeates, vs. *The Insurance Company of North America and James Talbot and Eliza Frances.*	Common Pleas. MANDAMUS.

Hearing on Petition and Return.

The Petition set forth that Relator had for some time past employed one Channell, a broker, to transact his business, with whom he had lodged a written order enabling him at all times to have access to a box containing his private papers; that on May 12, 1869, he called upon Channell for the purpose of selling certain stock in The Philadelphia Bank, The Farmers' and Mechanics' National Bank, and the Third National Bank of Philadelphia: That said Channell requested him to execute some blank "Orders of Transfer," which would be necessary, and handed him several printed blanks, saying that they were the regular forms. On the Relator's asking how many it would be necessary for him to execute, he was told by Channell that five would probably be enough; the Relator then, in said Channell's office, signed five of the said printed blanks, of the ordinary form; the Relator's name being the only portion written by him, and the names of the two witnesses, who had signed at the same time, being the only written portions of the instruments, when he delivered them to Channell. He then handed the same to Channell, telling him to use them and sell the said above mentioned stocks, naming them.

That the said Channell, after having disposed of the shares in the corporations above mentioned, fraudulently took from the private box of the Relator, the certificates for two hundred

shares of the stock of the Corporation defendant, and by means of fraudulently and feloniously forging two of the aforesaid Powers of Attorney, induced the said defendants to transfer the said shares of stock, and to issue certificates therefor to one James Talbot and one Eliza Frances, although they the said defendants possessed no authority whatever from the Relator, authorizing them so to do:—

And prayed the Court to issue a *Mandamus*, Alternative until final hearing, and Peremptory thereafter, requiring the said Corporation Defendant, by their proper officers, to amend the registry of the Capital Stock thereof by inserting the Relator's name as a holder of two hundred shares, and to award him one certificate therefor.

The Return, admitting the facts alleged, showed that the defendants had transferred the stock in the usual and ordinary course of business, on the presentation of the certificates of stock and a Power of Attorney, bearing the genuine *signature* of the Relator, and averred that it was the usual and ordinary course of business for such blank Powers of Attorney to be handed, with the certificates of stock sold, by the Broker, Agent for the Vendor, to the Broker, Agent for the Buyer, in blank—to be filled up by the latter.

On the suggestion of the Court that a Decree could not bind *bona fide* purchasers, unless they appeared, the said James Talbot and Eliza Frances, who, in their Return, showed that they were *bona fide* purchasers for value, were made Defendants of Record.

Fell, *Sanders*, } For Relator.

Evans, } For the Insurance Co.

Colton, } For James Talbot and Eliza Frances.

Before Vice-Provost MILLER.

February 23, 1870.

Thomas Cox vs. *The Steamer "Ariel."* — U. S. Circuit Court. For the E. D. of Penn'a. In Admiralty.

Hearing on Libel, Answer and Proofs.

The Libel set forth the following facts:—

The Libellant shipped certain goods on the Ship Ariel, from Philadelphia to Charleston, South Carolina, with the express agreement that the shipper should take upon himself the ordinary risks of navigation, *with the risk of fire.*

The Ariel, in the regular prosecution of her voyage, stopped at Chester, Pa., where during the night the Steamer was discovered to be on fire. The goods of the libellant were destroyed by the water thrown into that part of the vessel in which they were loaded, in order to extinguish the fire.

The Answer admitted the facts, but denied any negligence.

It appeared in the evidence, that the crew under the direction and by the command of the Captain, had used to put out the fire, the hose of the Steam Fire Engine Company, which had been brought alongside the Steamer, as she lay at the wharf; that they had carried this hose along the deck of the vessel and down through the hatchway, into that particular quarter where the libellant's goods were stowed, and where the fire was,—and had played water into this section of the ship, until the fire was extinguished, and the libellant's goods destroyed.

The value of the goods was proved.

The libellant claimed that he was entitled to recover compensation as under a *general average loss*, which defendants denied.

Ross, *Morgan*, For Libellant. — *Moore*, *Montgomery*, Contra.

Before Vice-Provost **JUNKIN.**

March 2, 1870.

Howard Express Co.
vs.
The Camden & Amboy R. R. Co. } District Court.

Case.

The Plaintiffs in their Narr. set forth the delivery of certain articles to defendants' employés at Philadelphia, to be shipped to New York, and the loss of the same, fraudulently taken and stolen by one of the servants of the defendants, while in the defendants' custody, to the damage of the plaintiffs, $500.

Defendants in their plea set forth a contract with plaintiffs, dated January 1st, 1860, by which it was agreed that defendants should carry a crate or car, with an agent or agents of the Express Company thereon, on certain trains, for certain tolls, contents unknown, and wholly under the control of said agents, to be delivered by them to whom they pleased, at any stations on the road; and by which it was then stipulated that in consideration of the premises and of the defendants granting the Express Company storage in all their depots, and allowing their agents *exclusively* to transact their business there, free of charge, the Express Company should hold the defendants free from all loss or damage to contents of said crate, or crates, or cars, or to any goods transported by said Express Company, or their agents, wherever or however caused, whether by the negligence of defendants or otherwise; and denied their liability under this contract for the fraud of their servants.

To this the plaintiffs demur, and for cause of demurrer say, that said plea is insufficient and bad in law, in that it alleges

that the contract of January 1st, 1860, is a sufficient defence to this action, and in that it avers that defendants are not liable for the fraud of their agents.

Hepburn,
Mays,
} For Demurrer.

Esling,
Easby,
} Contra.

Before Vice-Provost PENROSE.

March 9, 1870.

Francis White, Executor of Jonathan White, deceased, Defendant below, & Frederick Green, terre-tenant,
vs.
James F. Brown.
} Supreme Court, Error to District Court, City and Co. of Phila.

This was a *Sci. Fa.* sur mortgage;—at the trial it was proved that on January 9th, 1851, Jonathan White executed and delivered the mortgage in suit in favor of James F. Brown, the plaintiff below, but the mortgage was not recorded until July 2d, 1854. The mortgagor, White, died in April, 1853, leaving a son, having first made and published his last will and testament, duly executed, by which he devised the mortgaged property to his nephew, William Gray, at the same time devising property belonging to his said nephew, to a stranger. His nephew elected to take under the will. Letters testamentary on the said will were duly issued to Francis White on May 1st, 1853. On September 5th, 1855, the devisee sold the mortgaged premises to Frederick Green, the terre-tenant, whose deed was properly recorded on the same day. The mortgage searches against the decedent were brought down to six months

after his death, but not far enough to show the mortgage, and it was admitted that the terre tenant had no actual notice of the mortgage. The Court below reserved the question whether the record of a mortgage recorded more than six months after the mortgagor's death, would be *notice* to a purchaser from the devisee, under the circumstances of the case, and directed the jury to find for the plaintiff for the full amount paid.

The jury found as directed, and the Court afterwards entered judgment for the plaintiff on the reserved point, upon which the terre-tenant sued out this writ of error—assigning as error the judgment of the Court below.

Taylor, *Gendell*, } For Pl'ff in Error. — *Hunter*, *Platt*, } Contra.

Before the PROVOST.

March 16, 1870.

James, to the use of Schilling, Plaintiff in Error, vs. *Johnson, Defendant in Error.* } Supreme Court. Error to District Court.

This was an action of Trover and Conversion.

On trial it appeared that James, who was a citizen of Pennsylvania, and doing business there, had failed in 1857, and had that year made an assignment to Schilling, for the benefit of creditors. This assignment contained preferences.

At the date of the assignment, James was the owner of certain goods, being the same for the conversion of which this action was brought, in the possession of one McKay, a resident of Maryland. After the assignment, Johnson, also residing in Maryland, a creditor of James, commenced proceedings in foreign

attachment, under which the goods above mentioned were sold and bought by Johnson. Afterwards Johnson came to this State, where a writ in this cause was served upon him. It appeared, moreover, that the assignment was void, according to the laws of Maryland, on account of giving preferences.

The Court below instructed the jury, that as the property in question was at the time of the assignment situated in Maryland, by the laws of which State the assignment was void, it did not pass thereby, and was therefore liable to be attached by the creditors of the assignor; and that their verdict must be for the defendant, which is assigned as error.

Barrett, *Allison*, } For Plaintiff in Error.

Weigley, *Calhoun*, } For Defendant in Error.

Before Vice-Provost HARE.

March 23, 1870.

The Commonwealth of Pennsylvania, ex rel. J. Williams Smyth vs. *Thomas Sharp.* } Common Pleas. Hearing on Rule to show cause.

The Relator presented a petition under the Act of April 15, 1869 (*General Laws of* 1869, *pp.* 47–8), setting forth that he was the owner of certain Real Estate in the City of Philadelphia, describing the same, and that there was charged thereon a yearly ground rent of fifteen dollars per annum, which (under the usual covenants) had become irredeemable, and praying for a rule on Defendant to show cause why a decree for the extinguishment

thereof should not be made, on his being compensated therefor, in the manner provided by the Act of Assembly. The Court awarded the rule as prayed for.

Brown, *Horner*, } For Rule. *Hazlehurst*, *Lennig*, } Contra.

Before Vice-Provost RAWLE.

March 30, 1870.

Marshall vs. *Roosevelt.* } Supreme Court, In Equity. At Nisi Prius.

Hearing on Bill and Answer.

The Bill alleged,—

I. That the complainant is now seized of certain real estate (describing it), near Gray's Ferry, in the City of Philadelphia, and that he has resided on the same since the year 1855, when he became seized of the same, up to the present time, with his family.

II. That he is by occupation a nursery-man, and since 1855 has had a nursery on said premises, in which he has cultivated certain rare trees and plants for purposes of profit and sale.

III. That within the past year the defendant has erected, within about three hundred yards of complainant's property, large chemical works, which he is now working.

IV. That very frequently, and whenever the wind blows towards the complainant's house, the stench proceeding from said chemical works is so great that the comfort and convenience of

himself and his family are seriously interfered with; and that during the summer season it has been on this account, constantly and continually necessary to close the windows and doors of the house in order to remain there.

V. That a great number of the new, frail and delicate varieties of trees and plants in the complainant's nursery have withered and died, having been destroyed by the noxious vapors and gases proceeding from said works, to the great injury and damage of the said complainant. The Bill then prayed:—

1. That an Injunction issue, special, &c., &c., restraining the said defendant from using said works in such a manner as to produce the injuries complained of.

2. Further relief.

The Answer admitted the above allegations, and averred that the works owned by the defendant had been erected at a cost of over half a million of dollars; that they employed daily about a thousand men, that the products thereof were articles of prime necessity and value to the community, and that it was utterly impossible to conduct the business without producing the gases and vapors and other effects of which the defendant complained.

Hollingsworth, *Moore*, } For Plaintiff.

Kingston, *Pepper*, } For Defendant.

Before Vice-Provost McMURTRIE.

April 6, 1870.

Adams vs. *Cheever.* } District Court.

Rule to show cause, &c.

This was covenant on a ground rent deed, in which judgment had been obtained on two returns of "*nihil.*" The lot out of which the rent issues not being sufficiently valuable to satisfy the arrears, the plaintiff has issued execution against that and other land belonging to the defendant.

A rule has been obtained to show cause why the levy and execution should not be set aside, as far as concerns the land other than that out of which the rent issues.

Smithers, *Outerbridge*, } For Rule. *West*, *Leach*, } Contra.

Before Vice-Provost JUNKIN.

April 13, 1870.

Oxford and Philadelphia R R., Plaintiffs in Error, and Defendants below, } Supreme Court.

vs.

Aaron Taylor, Defendant in Error. } Error to District Court.

Case. Plea, "Not Guilty."

The following facts appeared in evidence at the trial:

The plaintiffs in error were common carriers, and received in Philadelphia twenty barrels of oysters, consigned to Aaron Taylor, Oxford, Pa. The oysters arrived safely at Oxford, the ter-

minus of the road, and were deposited in the Company's warehouse at that place. After the barrels had remained in the warehouse nearly two weeks, they were destroyed by fire, without fault or negligence on the part of the Railroad Company being shown.

The Judge charged the jury that "as the Company had not given notice of the arrival of the oysters to the consignee, their responsibility as Common Carriers still continued—they had not assumed the new character of Warehousemen, and were liable for the loss."

Defendants excepted.

Jury found for plaintiff.

Defendants sued out this writ of error, assigning as error the charge of the Court below.

Bennett, *Saunders*, } For Plaintiffs in Error. { *Spencer*, *Krumbhaar*, } For Defendant.

Before the PROVOST.

April 20, 1870.

Wilson, Plaintiff in Error and Defendant below, vs. *Poland, Defendant in Error.* } Supreme Court. Error to District Court.

Ejectment.

This was an Action of Ejectment brought by Mary Poland, after the death of her husband, to recover possession of certain real estate. On trial in the Court below, the facts of the case appeared in evidence, as follows:

Mary Poland executed, January 3d, 1859, a bond with warrant of attorney annexed, in both of which instruments her hus-

band joined, and February 5th, 1860, Judgment was entered thereon.

Upon the 5th day of April, 1864, a *sci. fa. quare ex. non* issued. Judgment was taken by default, on two returns "*nihil*," and execution levied on Mary Poland's separate property. The property was bought at Sheriff's sale by James Wilson, the plaintiff in error. The record disclosed the fact that Mary Poland, as a wife, executed the writing obligatory on which the Judgment was entered, along with her husband, on the day of its date.

The Judge charged the jury that "a judgment in a *sci. fa.*, on a void judgment, was absolutely void. A sale under such judgment, passed no title to Sheriff's vendee with notice."

Defendant excepted.

Verdict for Plaintiff.

Thereupon the Defendant sued out this writ of error, assigning as error the charge of the Court below.

Rich, *Allison*,	For Plaintiff in Error.	*Miller*, *Reed*,	For Defendant in Error.

Before Vice-Provost MILLER.

April 27, 1870.

Thompson, Assignee in Bankruptcy of William Haightman, vs. *James Haightman.*	District Court of U. S. Eastern District of Penn'a.

Assumpsit. Point reserved.

This was an action instituted by the assignee to recover twenty-five thousand dollars paid by bankrupt to defendant, who was his brother, within four months before his voluntary bankruptcy, and alleged to have been a fraudulent preference.

On trial the following evidence was submitted on the part of the defendant. In October, 1868, defendant, who had frequent business transactions with his brother, the bankrupt, became aware that his affairs were in a bad way; the bankrupt was at that time heavily in debt to defendant, but continued after that time to press for loans, which were made to the extent of $13,500.

In the latter part of November, James Haightman, the bankrupt, came to the defendant's place of business, and told him that "he thought if he could raise twenty-five thousand dollars anywhere, it would see him through."

The next day, defendant sent bankrupt a check to his order, enclosed with the following note, which was in evidence:

"DEAR JAMES—If you feel *certain* you can weather the "storm, use the enclosed, being the amount you mentioned yes- "terday, but run no risk, as you know the loss might ruin me.

"Your brother,

"W. H."

"Nov. 17th, '68."

The check, which was also produced, was duly endorsed by bankrupt, and passed to his *private account*, which was separate from his business account, but kept in the same bank. On the following day, the 18th, the bankrupt drew a check for the amount, $25,000, to defendant's order, and sent it to him without any message. On the 26th, he became a voluntary bankrupt.

No instance was shown from the bankrupt's books (which were in the hands of the assignee), except the present one, of any check in the way of his general business being drawn by bankrupt on his private account.

The Court ordered the jury to find for the plaintiff, with interest, reserving the point whether, under the circumstances, the payment constituted a fraudulent preference under Section xxxv. of the Bankrupt Act.

O'Niell, Peirce, } For Assignee. — *Megargee, McCarthy,* } For Defendant.

Before Vice-Provost PENROSE.

May 4, 1870.

John S. Atkins and Wm. Davenant, vs. *C. Evans.* } Supreme Court. At Nisi Prius.

Hearing in Bill and Answer.

The Bill avers that the complainants in 1860, entered into a general partnership with defendant, a citizen of Philadelphia, in the tobacco business, to be carried on in the city of Philadelphia, and also in the States of Virginia and Maryland, to continue for a term of ten years. That in April, 1865, one hundred bales of first quality Virginia Tobacco belonging to the firm were seized, and as complainants believe, confiscated by the U. S. forces. That in October, 1865, the U. S. Government restored to the defendant the said tobacco, on his paying certain expenses amounting to $350.

The Bill then alleges that the firm was insolvent.

The prayer of the Bill is:

1. That defendant be decreed to account.

2. That he be restrained from selling said tobacco, or from using the same for his private purposes.

3. Further relief.

The defendant's answer admits the allegations of the Bill, and avers:

That the complainants, at the time of the seizure of the said tobacco, were and still continue to be residents and citizens of the State of Virginia. And that the said compensation was awarded to him in express exclusion of the rights of complainants, as alien enemies.

Brown, *Easby*, } For Complainants. *Kendall*, *Colton*, } For Defendant.

Before Vice-Provost RAWLE.

May 11, 1870.

Henry Holcombe, Plaintiff in Error,
vs.
Lewis Wallis, Defendant, and James Smith, Administrator of Charles Wallis, deceased, Garnishee.
} Supreme Court. Error to District Court.

Foreign Attachment. Case.

This was a suit brought by plaintiff to recover, under the money counts, fifty pounds sterling, out of the funds attached in the hands of the garnishee, who was administrator of the estate of defendant's father.

Plaintiff, at third term after suit brought filed a narr., and on September 5, 1868, obtained judgment for want of an appearance, and damages were duly assessed at $412 50. On Sept. 21st, an appearance was entered for defendant, who was then admitted to defend, under Section 64 of the Act of June 13, 1836 (Purdon, p. 495, pl. 27).

On trial, plaintiff was sworn, and stated that on August 11th, 1867, he met defendant in London; that defendant borrowed of him fifty pounds, alleging that he was in daily expectation of a Letter of Credit, and would immediately repay the amount to plaintiff's bankers; that since that time he had never seen nor heard from defendant, and that the money had never been repaid.

This was the only evidence submitted by plaintiff's counsel.

Defendant was then called by his counsel, who utterly denied plaintiff's statements.

Plaintiff's counsel, on cross-examination, asked defendant, "whether he had not been arrested on a charge of forgery, at "the instance of the Farmers' and Mechanics' Bank, in Phila- "delphia, in 1864, and escaped, and before his return to "this country, had not obtained a pardon from the Governor of "the State of Pennsylvania."

Defendant's counsel rose to object.

The Court, *of its own motion*, instructed the defendant, that as a witness, he could not be compelled to answer any question collateral to the issue, having a direct tendency to degrade his character.

Plaintiff excepted, and, on Verdict for Defendant,—

Sued out this writ of error, assigning as error, the above instruction to the witness of the Court below.

Barrett, *Biddle,*	For Plaintiff in Error.	*West,* *Weigley,*	For Defendant.